IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 24, 2006 Session

STATE OF TENNESSEE v. STANLEY CORNELIUS OSBORNE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-3096 Monte Watkins, Judge

No. M2005-02926-CCA-R3-CD - Filed June 29, 2007

The appellant, Stanley Cornelius Osborne, was convicted by a jury in the Davidson County Criminal Court of one count of aggravated sexual battery. He received a sentence of ten years in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's failure to (1) exclude the appellant's statement to police during a custodial interrogation, (2) exclude a statement made by the victim in the course of her medical treatment, (3) exclude a statement made by the victim because it was not an excited utterance, and (4) exclude testimony regarding the contents of a "lost confession letter" because it was not disclosed in discovery and the "testifying witness did not remember significant portions of the letter." Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Richard Tennent, Nashville, Tennessee, for the appellant, Stanley Cornelius Osborne.

Robert E. Cooper, Jr., Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In early August 2003, just before her twelfth birthday, the victim, A.L.R.,[1] spent a Tuesday night at the home of her cousin, Latoya French, to help with a birthday party for French's daughter,

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[1] It is the policy of this court to refer to minor victims of sexual crimes only by their initials.

Pyasia.[2] Staying at the residence that night were French; Pyasia; A.L.R.; A.L.R.'s cousin, Christopher Carr, Jr.; her best friend, Jessica Bracey; French's boyfriend, Dee; and the appellant. A.L.R. stated that the appellant was the uncle of French's baby. French and Dee slept in a room upstairs while everyone else slept in the living room downstairs. Carr slept on one couch. A.L.R. and Bracey shared another long couch with A.L.R. at the top and Bracey at the bottom. A.L.R. and Bracey shared "cover" on the couch. Pyasia and the appellant slept on a mattress which was on the floor near the couch where A.L.R. slept.

A.L.R. testified that when she fell asleep, she was wearing a bra, underwear, shorts, and a T-shirt. She awoke once in the night because she was uncomfortable then fell back asleep. The next time A.L.R. awoke, she felt someone touching her breast underneath her bra. She opened her eyes and saw that her shirt was pushed up to her neck, exposing her bra and her breast, and the appellant was touching her breast. A.L.R. did not say anything, but she pushed the appellant's hand away. The appellant stopped, and A.L.R. went back to sleep. A.L.R. awoke again to find the appellant pulling off her shorts and underwear. A.L.R. testified that the appellant got on top of her and forced his penis inside her vagina. A.L.R. said that "it hurt real bad." A.L.R. recalled that her legs were straight and not bent during the incident. During the offense, the appellant asked A.L.R. to go upstairs with him. She did not say anything out loud, but she cried silently. The appellant stopped and pulled A.L.R.'s shorts and underwear back into place and replaced the covers over her. The appellant went back to bed, and A.L.R. went back to sleep.

The next morning, A.L.R. awoke and noticed that her shorts were on incorrectly. She fixed her shorts but did not tell anyone what had occurred. She explained that she was afraid the appellant would try to hurt her if she told anyone. Later, Bracey asked A.L.R.'s cousin if A.L.R. was a virgin, and the cousin spoke with A.L.R. At that time, A.L.R. discovered that Bracey had seen the appellant on top of her.

The following Sunday, A.L.R. went to church with her mother, Angela Ward, and her grandmother, Annette Allison. A.L.R. recalled that the "pastor was talking about how family members touch other family members and stuff like that, how kids are being raped by their own family members." After church that morning, A.L.R., Ward, and Allison went to another church where Ward and Allison sang. After the singing, A.L.R. told Allison that the appellant had raped her. A.L.R. cried while making the disclosure to Allison. At that point, Allison insisted A.L.R. tell Ward. A.L.R. explained that she told about the rape "[b]ecause it kept on – it kept on irritating me. And it was hurting me, so I just went on and told it."

A.L.R. recalled that she was taken to a hospital that Sunday night. She did not recall if the nurse asked her any questions. A.L.R. insisted that she told the truth when she was interviewed at Our Kids Center and at the Child Advocacy Center. She admitted that, because she did not want to talk about the incident, during one interview she said that she slept through the rape. She maintained

[2] This individual is also referred to in the record as "Tyasha."

that not mentioning the rape did not mean that she lied, only that she left out details. A.L.R. asserted that no one had told her what her testimony should be and that she was telling the truth.

Phyllis Lynn Thompson testified that she was a clinical social worker at Our Kids Center. She said that the purpose of Our Kids Center was to provide medical examinations and psychosocial evaluations to children when there are concerns of sexual abuse. Thompson testified that Ward brought A.L.R. to the center. As was typical, Carolyn Smeltzer, a nurse practitioner, interviewed Ward regarding family medical history while Thompson interviewed A.L.R. about medical history and the allegations of abuse. Thompson explained to A.L.R. the importance of being truthful about the abuse because her reports would determine which tests would be conducted, how the evaluation would be performed, and the medicines that would be prescribed.

Thompson testified that A.L.R. understood the procedure. A.L.R. told Thompson that she was afraid of AIDS because she had lost a family member to the disease. A.L.R. disclosed that she was having nightmares about the abuse and that she awoke in sweats after the nightmares. A.L.R. told Thompson that she awoke to find the appellant touching the skin of her breast with his hand. She pushed him away, but the appellant got on top of her and placed his penis in her vagina. A.L.R. recalled that after the abuse, the appellant pulled up her shorts incorrectly. A.L.R. admitted that she was "fearful" of the examination. After the interview, Smeltzer performed the examination. Thompson did not participate in the examination. Following the examination, Thompson met with Ward to provide further recommendations.

Latoya Monique French testified that she had lived in public housing at 619 Charles E. Davis since 2002 and was living at that location at the time of the offense. French testified that for five years "off and on," beginning in 1999, she dated the appellant's brother, Antonio. French stated that Antonio was the father of her youngest daughter, Dominique, and, occasionally, the appellant came to visit. In August 2003, French was dating a man named "Dee"; she did not know Dee's last name.

On August 4, 2003, A.L.R., Bracey, and Carr stayed at French's residence to help her prepare for a birthday party for her daughter, Pyasia. Dominique was staying with her father and grandmother that night. That night, A.L.R. had a bad headache, so French gave her two ibuprofen and told her to lie down on the couch. The appellant came to visit; however, French did not believe he would spend the night as he had never done so previously. That night, French and Dee slept in her upstairs bedroom, while A.L.R., Bracey, Carr, and Pyasia slept downstairs. A.L.R. and Bracey shared a couch, and Carr slept on another couch. Pyasia slept on a mattress in the floor near the couch shared by A.L.R. and Bracey. When French went downstairs the following morning, everyone was sleeping, and the appellant was still in the house. A.L.R. did not tell French that anything was wrong.

In late 2003, French received a letter from the appellant, bearing his return address and his handwriting. French gave the letter to Ward.

The victim's mother, Angela Ward, testified that she read the letter the appellant sent to French. In the letter, the appellant stated that he "f[*]cked" A.L.R. because she wanted him to, but he denied knowing her age. French stated that the appellant did not express any remorse for his actions. Ward looked for the letter to bring it to court, but she was unable to locate it.

Annette Allison, Ward's mother and A.L.R.'s grandmother, testified that on a Sunday afternoon in mid-August 2003, she, Ward, and A.L.R. went "fellowshipping" at the Holy Trinity Church. Allison, Ward, and A.L.R. sat in the choir stand because they were at the church to sing. Allison's pastor, Reverend Charles Johnson, gave a sermon regarding how decisions affect a person's life. Allison recalled that he also preached about "how people touching the young people . . . . And if anyone would ever do it to you tell somebody, you know, because that could affect your life and different things like that." Because Allison was busy listening to the sermon, she did not observe A.L.R.'s reaction to it.

Before the service ended, Allison, Ward, and A.L.R. left to go to a church in Dickson where Allison and Ward were scheduled to sing. About three hours after the service at the Holy Trinity Church and after the conclusion of the Dickson service, A.L.R. approached Allison. A.L.R. was quiet and upset, and she said, "Nanny, I've been raped. I was raped." A.L.R. identified the appellant as the rapist. Allison insisted that A.L.R. tell Ward. When Ward and Allison questioned A.L.R., she told them that the rape occurred at French's house, she awoke with her shorts on incorrectly, and Bracey saw the appellant on top of her.

Jessica Bracey testified that she spent the night at French's residence on more than one occasion but only once with A.L.R. Bracey had seen the appellant at French's residence on previous occasions. He usually visited with French and her children and left after visiting. However, the appellant also stayed overnight when A.L.R. and Bracey stayed to help French with a birthday party.

Bracey recalled that French and Dee slept upstairs while she and A.L.R. shared a couch downstairs. Bracey said that there was a mattress on the floor two or three feet from the couch. During the night, Bracy was watching the "Apollo show" on television when she noticed the appellant take off A.L.R.'s clothes. The appellant was not wearing clothes, and he got on top of A.L.R. Bracey stated that the appellant "pulled the cover off and started moving back and forth." The appellant was on top of A.L.R. for approximately fifteen minutes; he spent five minutes moving back and forth and spent the rest of the time lying still on top of A.L.R. Bracey recalled that A.L.R. was lying on her stomach, and the appellant was facing A.L.R. with his head positioned beside her neck. Bracey did not remember A.L.R. or the appellant saying anything during this time. Bracey believed that A.L.R. was asleep because she was not moving. When the appellant got off of A.L.R., he went upstairs. He came back down fifteen minutes later and returned to the mattress.

The next morning, Bracey spoke with A.L.R. about what she had seen. A.L.R. did not say that she recalled being raped; however, A.L.R. told Bracey that she had noticed that her shorts were buttoned incorrectly. After considering what Bracey had seen in conjunction with A.L.R.'s shorts

being buttoned incorrectly, the girls believed that "something happened." The girls discussed telling A.L.R.'s parents what Bracey had seen.

Carolyn Smeltzer, a forensic nurse practitioner employed through Vanderbilt Medical Center to work at Our Kids Center, testified that she performs medical evaluations on children when there are concerns of sexual abuse. On August 15, 2003, Smeltzer performed an examination on A.L.R. Smeltzer recalled that at the time of the examination, A.L.R. was two weeks away from her twelfth birthday. Smeltzer observed that A.L.R. "was very well developed. She had basically the body of an adult female." During the examination, Smeltzer looked mainly for signs of old injury or signs of infection. She found neither. Further, Smeltzer noted that A.L.R.'s hymen was intact. Regardless, Smeltzer opined that her examination indicated that "an object at least of that size of the speculum could penetrate her hymen without causing any injury." Smeltzer said that her findings did not indicate that penile penetration had occurred, but her findings did not indicate that penetration had not occurred. Specifically, Smeltzer explained that penetration does not always leave signs of injury, and, even if injury had occurred, the length of time between the injury and the examination would have been sufficient for the injury to have healed.

Detective Robert Carrigan with the Metro Police Department testified that on August 10, 2003, the Metro Police Department received a request to investigate the sexual abuse of A.L.R. On August 12, 2003, Detective Carrigan was assigned to the case. Detective Carrigan testified that he worked the case with Detective Brett Gipson.[3] Detectives Carrigan and Gipson learned that the appellant was a suspect, and they attempted to locate him. However, Detective Carrigan learned that the appellant had no permanent address and instead lived with various family members. The detectives tracked the appellant to the home of his grandmother, and they set up surveillance of the home.

When the detectives saw the appellant come out of his grandmother's home, Detective Gipson approached the appellant. Detective Carrigan saw Detective Gipson and the appellant speak, then the appellant walked back toward the house. Detective Carrigan approached Detective Gipson, and Detective Gipson stated that he was not sure if the appellant was the individual they were seeking. Detective Carrigan responded that the appellant matched the description of the suspect. As the detectives walked toward the house, they saw the appellant jump over the backyard fence. The detectives called patrol officers to assist. The police cordoned off the area and searched for the appellant for thirty or forty-five minutes before he was found. The appellant was arrested and taken to police headquarters.

Once at headquarters, Detectives Carrigan and Gipson interviewed the appellant. The appellant stated that one night he stayed at French's residence, and A.L.R. and Bracey were also there. The appellant, Bracey, A.L.R., and French's toddler daughter, Dominique, slept downstairs. The appellant and Dominique slept on a mattress, and A.L.R. and Bracey slept on a couch. The appellant stated that he awoke in the night and found Bracey "grinding" her butt against him.

[3] In the record, this individual is also referred to as Fred Gibson.

Dominique began crying, so the appellant got up to get her water. The appellant, who was holding Dominique, sat on the couch between A.L.R. and Bracey. The appellant gave Dominique the water and put her on the mattress.

A.L.R. asked the appellant what he was doing because she thought she had felt him touch her leg. The appellant denied touching A.L.R.; however, after she asked the question, the appellant began to touch her. The appellant "touched her chest with his hand. Touched her breast skin on skin." The appellant stated that A.L.R. then pulled down her pants. The appellant said he could not remember what his clothes were like at that time, but his erection was probably protruding from a hole in his boxer shorts. The appellant got on top of A.L.R. and inserted his penis approximately two inches into her vagina. He stayed on top of her for ten or fifteen minutes. The appellant ejaculated onto a pair of shorts. The appellant stated that A.L.R. "[j]ust laid there" after it was over. Detective Carrigan recalled that the appellant "purported it as if she was willing. He didn't force her." The appellant said, "I didn't rape her. It was just having sex." The appellant stated that he knew A.L.R. was younger than he, but he did not know that she was eleven years old. The appellant said that Bracey was also on the couch during the incident, but he did not know if she was asleep or awake. He surmised that she was awake but pretending to be asleep.

The appellant told the detectives that if he raped her, A.L.R. should have said something on Tuesday when the offense occurred instead of waiting until Sunday to report it. The appellant acknowledged that he was aware of A.L.R.'s accusations. Detective Carrigan stated, "He knew we were looking for him and he had run when we initially approached him." The appellant apologized for giving the officers a false name.

The appellant told Detective Carrigan that the morning after the incident, he found a letter from Bracey to A.L.R. In the letter, Bracey asked A.L.R. if the appellant did "anything" with her on the previous night. Bracey told A.L.R. that the appellant would not do "anything" with her even though she tried to get him to have sex with her. The appellant claimed that he threw the letter away after reading it. Detective Carrigan asserted that until the morning he testified at trial, he had not heard of the letter that the appellant wrote French.

The sole defense witness was Ann Carolyn Fisher, a forensic interviewer employed by the Montgomery County Child Advocacy Center. Fisher stated that she interviewed A.L.R. on October 2, 2003. In the interview, A.L.R. said that nothing happened. However, A.L.R. also stated that the appellant touched her on the breast and that he raped her. Fisher did not ask for further details concerning what A.L.R. meant by "rape." Fisher acknowledged that research showed that occasionally child victims of sexual crimes will make "false denials" because they are uncomfortable discussing the incident. Fisher opinied that it was not unusual for a child victim to feel uncomfortable about reporting all of the details about an incident. A.L.R. told Fisher before the interview that she was scared and nervous. Fisher had to remind A.L.R. to breathe because she kept holding her breath, a "symptom of great tension."

The jury found the appellant not guilty of rape of a child but found him guilty of aggravated sexual battery. The trial court sentenced the appellant to ten years in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's failure to (1) exclude the appellant's statement to police, alleging that police failed to honor the appellant's invocation of his right to an attorney during a custodial interrogation; (2) exclude a statement made by the victim in the course of her medical treatment; (3) exclude a statement made by the victim because it was not an excited utterance; (4) and exclude testimony regarding the contents of a "lost confession letter" because it was not disclosed in discovery and the "testifying witness did not remember significant portions of the letter."

II. Analysis

A. Right to Attorney

First, we will address the appellant's contention that police failed to honor his invocation of his right to an attorney during a custodial interrogation. Specifically, the appellant argues that he "unequivocally invoked his right to counsel by reading from the written rights waiver, 'I do not want a lawyer at this time; and then immediately and unequivocally stating, 'Yes, I do!'"

Prior to trial, the appellant filed a motion to suppress his statement to police on the basis that police continued to question him after he invoked his right to an attorney. At the suppression hearing, Detective Brett Gipson testified that in August 2003, he and Detective Carrigan were investigating the appellant's involvement in rape charges concerning A.L.R. On August 15, 2003, Detective Gipson went to a residence where the appellant was staying to arrest him on an outstanding probation violation. When Detective Gipson arrived, he saw the appellant exiting the house. Detective Gipson approached the appellant and asked if he was "Stanley Osborne." The appellant responded negatively, giving the detective a false name and saying that he had identification confirming his name. Detective Gipson asked the appellant to obtain the identification because he thought the appellant looked like "Stanley Osborne."

The appellant walked toward the house then began running. Patrol officers found the appellant hiding behind a tree in the woods. After his apprehension, the appellant was handcuffed and placed in the back of a patrol car, and Detective Gipson told him that they needed to talk for a few minutes "back at the station." Detective Gipson did not recall if he told the appellant he wanted to discuss the rape charges.

A patrol officer drove the appellant to the Criminal Justice Center (CJC) then took him to an interview room. The patrol officer asked the appellant for basic information for the probation violation arrest report. Detectives Gipson and Carrigan activated a recording device to videotape the interview, then they entered the interview room. The appellant was uncuffed prior to speaking with the detectives. The detectives told the appellant that he was at the CJC for a probation violation, but they needed to talk with him regarding a different matter. Detective Gipson observed

that the appellant did not appear to be under the influence of any intoxicating substance, and he seemed to be of sound mind.

The detectives read the appellant his Miranda rights from a printed waiver form and allowed him to read the form as well. The waiver form contained the following paragraph:

> I have read this statement of my rights or had the rights read to me and I understand what my rights are. I am waiving or giving up those rights and I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. I also understand that at any time I choose to stop answering questions the interview will cease.

The appellant read aloud the waiver of rights form. After he read the portion which stated, "I do not want a lawyer at this time," the appellant said, "Yes, I do," then he proceeded, without stopping or pausing, to read the remaining portion of the form aloud. Detective Gipson testified that when the appellant finished reading the form, he started to sign it. Detective Gipson stopped the appellant, asking, "A minute ago you said that you wanted a lawyer when you were reading that. Do you want to talk to us now with a lawyer or without a lawyer?" Detective Gipson said that "[i]n light of what [the appellant] was doing in continuing the form and signing," he did not believe the appellant's statement "Yes, I do" was an unequivocal assertion of his right to counsel. Detective Gipson maintained that he did not want to continue the interview if the appellant wanted counsel. Therefore, he wanted to clarify what the appellant had meant when he read the form.

The appellant responded that he wished to speak with the detectives at that time without an attorney, but he wanted an attorney at some point in the proceedings. The appellant remarked that it would probably take two weeks to secure counsel. The detectives told the appellant that it probably would not take that long. They explained that they would not question the appellant at that time if he wanted to have a lawyer present for the interview. After clarifying that the appellant wanted to speak with the detectives without a lawyer present, the appellant signed the waiver of rights form and gave a statement to police. A videotape of the interview was played for the court.

After the suppression hearing, the trial court issued an order denying the motion to suppress. The trial court found that the appellant's statement "Yes, I do" was an equivocal invocation of his right to counsel "since he added that he could not get a lawyer." The court noted that after the appellant made the equivocal statement, Detective Gipson clarified the appellant's intention before the appellant signed a waiver of his Miranda rights. The court found that the appellant "made equivocal statements potentially expressing a desire to have counsel present at the interview at the police station. However, [Detective] Gipson was correct in stopping the interrogation to clarify [the appellant's] statements and intentions." The trial court noted that the appellant signed the waiver form after his rights had been clarified. Thus, the trial court determined that the appellant wished

to speak with the detectives without counsel present. On appeal, the appellant challenges the trial court's ruling, arguing that his statement "Yes, I do" was an unequivocal assertion of his right to an attorney.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Accordingly, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Moreover, "when a trial court's findings of fact at a suppression hearing are based on evidence that does not involve issues of credibility, a reviewing court must examine the record de novo without a presumption of correctness." State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000). When the evidence reviewed by a trial court includes both evidence not requiring a credibility determination and evidence requiring a factual finding of credibility, a "dual standard of review" will be employed. State v. Treva Dianne Green, No. E1999-02204-CCA-R3-CD, 2000 WL 1839130, at *7 (Tenn. Crim. App. at Knoxville, Dec. 14, 2000).

The Fifth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution generally provide to individuals accused of criminal activity a privilege against self-incrimination; therefore we must examine the voluntariness of statements taken during custodial interrogation. State v. Callahan, 979 S.W.2d 577, 581 (Tenn. 1998). For such a statement to be admissible, the statement must have been freely and voluntarily made following a knowing waiver of the right to remain silent or to the right to an attorney. See Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). Upon a suspect's unequivocal request for an attorney, police must cease all interrogation unless the suspect initiates further communication. See Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85 (1981); State v. Stephenson, 878 S.W.2d 530, 545 (Tenn. 1994). "'[A]lthough a suspect need not speak with the discrimination of an Oxford don,' the accused 'must articulate his desire to have counsel present sufficiently clearly that a reasonable officer would understand the statement to be a request for an attorney.'" State v. Saylor, 117 S.W.3d 239, 245 (Tenn. 2003) (quoting State v. Huddleston, 924 S.W.2d 666, 669-70 (Tenn. 1996); see also Davis v. United States, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994). "If the suspect fails to make such an unambiguous statement, police may continue to question him without clarifying any equivocal requests for counsel." Id. at 246. Whether a request for counsel was equivocal or unequivocal is a question of fact. State v. Farmer, 927 S.W.2d 582, 594 (Tenn. Crim. App. 1996).

The facts adduced at the suppression hearing reflect that when the appellant read aloud the portion of the waiver form which stated, "I do not want a lawyer at this time," he said, "Yes, I do," and, without stopping or pausing, read the rest of the form aloud and immediately moved to sign the form. Ordinarily, an "accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request [for counsel] itself." Smith v. Illinois, 469 U.S. 91, 100, 105 S. Ct. 490, 495 (1984). However, in the instant case, it was not the appellant's

"postrequest responses to further interrogation" that cast doubt upon his possible invocation of the right to counsel. Instead, the appellant's own behavior, unprompted by law enforcement, was contradictory to his statement "Yes, I do."

Prior to the appellant reading aloud from the waiver of rights form, Detectives Gipson and Carrigan explained to the appellant his right to an attorney and his right to counsel. Immediately after the appellant said "Yes, I do," which was ostensibly a request for counsel, he then read the remainder of the form and began to sign the waiver of rights. Like the trial court, we conclude that the appellant's request for counsel was equivocal. As the Supreme Court has cautioned:

> [W]hen a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. . . . Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel.

Davis, 512 U.S. at 462, 114 S. Ct. at 2356. In the instant case, after the appellant's statement regarding counsel, Detectives Gipson and Carrigan thoroughly questioned the appellant solely on his willingness to speak with police without the presence of counsel. They did not interrogate the appellant about the crime until after the appellant expressly waived his right to counsel. Our review of the videotape of the interview confirms the detectives' testimony. Accordingly, like the trial court, we conclude that police did not violate the appellant's Miranda rights, and, therefore, the appellant's statement was admissible at trial.

B. Medical Treatment

The appellant's second complaint concerns the trial court permitting Thompson to testify regarding A.L.R.'s statment, prior to her medical examination, that the appellant had fondled her breast and had penetrated her vagina with his penis. The appellant argues that the statement was hearsay and that "[t]he medical treatment and diagnosis exception does not permit the introduction of a forensic interview that is not provided to any medical treatment personnel and is, instead, turned over exclusively to law enforcement." Specifically, the appellant contends that Thompson's interview was never given to a "treating physician." Further, the appellant contends that the interview was strictly for a police investigation and not for medical treatment.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). As a general rule, hearsay is not admissible during a trial, unless the statement falls under one of the exceptions to the rule against hearsay. See Tenn. R. Evid. 802. Tennessee Rule of Evidence 803(4) provides that "[s]tatements made for purposes of medical diagnosis and treatment

describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment" are not excluded by the hearsay rule. A trial court's determination on the admissibility of evidence will not be overturned absent an abuse of discretion. State v. Stinnett, 958 S.W.2d 329, 331 (Tenn. 1997).

Statements made for medical diagnosis and treatment are considered "presumptively trustworthy" because generally a patient is highly motivated to provide accurate information so that a correct diagnosis and proper treatment may be obtained for the sake of the patient's health. State v. McLeod, 937 S.W.2d 867, 870 (Tenn. 1996). However, when the declarant is a child, that child "may not understand the need to be truthful in a medical setting." Id. Therefore, a trial court should evaluate "all of the circumstances surrounding the making of the statement[]," including but not limited to whether the statement was in response to leading questions or whether the child is involved in a bitter custody battle or family feud, to determine whether the statement was in fact made for the purpose of medical diagnosis and treatment. Id. at 871.

At trial, Thompson testified that her role with Our Kids Center "is to, basically, when a family comes to our center . . . I gather presenting history with the caregiver or the person who has brought the child. I, then, do a medical history with the child, alone. I prepare that child for their medical exam and, basically, provide recommendations based on – on what was presented during that time." During the interview, Thompson explained to A.L.R. that the interview would determine the course of the medical examination and ensuing treatment. A.L.R. told Thompson that on the night of the incident, she a
woke to find the appellant touching the skin of her breast with his hand. After she pushed him away, the appellant got on top of her and placed his penis in her vagina. After the interview, Thompson told Smeltzer, the nurse practitioner who was performing the examination, about A.L.R.'s medical history and "explain[ed], specifically, what kind of contact that the child talked about." Thompson testified that, based on the information given during the interview, the treating physician, who in this case was Smeltzer, would determine the nature of the tests conducted, the examinations performed, and the medicines prescribed. Smeltzer performed the examination, and, after the examination, Thompson met with Ward and provided recommendations for further courses of action. Thompson stated that she subsequently prepared a report about her interview with A.L.R., and the report was "mailed to General Hospital, where they keep our records."

We conclude that the foregoing proof reflects that A.L.R.'s statement was made for medical diagnosis and treatment. Therefore, the trial court did not err in allowing the victim's statement to be admitted at trial. Moreover, any error in admitting the victim's statement, in light of the other admissible proof at trial, was harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

C. Excited Utterance

Next, the appellant complains that the trial court erred by admitting as an excited utterance A.L.R.'s statement to her grandmother, Allison, regarding the rape. The appellant contends that the

statement was not made "contemporaneously with any exciting event" and was instead made after A.L.R. had "time to reflect and deliberate." The State contends that the "startling event" was the sermon, which related back to the sexual abuse. Therefore, the State maintains, the lapse of time was not so great and indicated that A.L.R. was still operating under the stress of an exciting event.

As we noted earlier, hearsay statements are generally excluded from trial. However, an exception is made for excited utterances. A statement is considered an excited utterance if it "relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tenn. R. Evid. 803(2); see also State v. Gordon, 952 S.W.2d 817, 819 (Tenn. 1997). In order for a statement to qualify as an excited utterance, (1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the statement must be made while the declarant is under the stress or excitement from the event or condition. Gordon, 952 S.W.2d at 820. The startling event is typically the act underlying the legal proceedings, for example an assault or accident; however, "a subsequent startling event or condition which is related to the prior event can produce an excited utterance." Id. "The ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication." State v. Smith, 857 S.W.2d 1, 9 (Tenn. 1993). As we earlier noted, trial courts have broad discretion in determining the admissibility of evidence, and their rulings will not be disturbed on appeal absent an abuse of that discretion. McLeod, 937 S.W.2d at 871.

The time interval between the startling event and the statement is only one consideration in determining whether the statement was made under stress or excitement. "'Other relevant circumstances include the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant, including such characteristics as age and physical or mental condition; and the contents of the statement itself, which may indicate the presence or absence of stress.'" Gordon, 952 S.W.2d at 820 (quoting Neil P. Cohen et al., Tennessee Law of Evidence, § 803(2).2 at 534 (3d ed. 1995)).

The proof at trial revealed that the offense occurred on Tuesday. The following Sunday, A.L.R., Ward, and Allison went to church, and the minister spoke about children being touched inappropriately and raped by family members. Before the service ended, the three females went to another church where Ward and Allison sang. Afterward, A.L.R. told Allison that she had been raped and that the appellant was the rapist. The testimony of the witnesses indicated that the victim was crying when she made the disclosure and that she was quiet and upset before the disclosure. A.L.R. asserted that she told about the rape "[b]ecause it kept on – it kept on irritating me. And it was hurting me, so I just went on and told it." Approximately three hours elapsed between the sermon about family sexual abuse and the disclosure of the incident.

First, we must determine whether A.L.R. was operating under the stress or excitement of a "startling event" at the time she made her statement to Allison. Clearly, sexual abuse is a startling event; however, the State contends that the startling event in the instant case was the pastor's sermon

regarding familial sexual abuse. Clearly, a sermon could be a startling event; however, we question whether, without more information, we can conclude in the instant case that the sermon was a "startling event." Next, we must determine if A.L.R. made the statement while under the stress or excitement from the startling event. The testimony at trial reflects that A.L.R. was crying and upset at the time she made the statement. However, the proof also reflects that the startling event occurred hours prior to the statement. We acknowledge that time is but one consideration in determining whether a statement is made while under stress of a startling event. Nonetheless, we are concerned about A.L.R.'s testimony that she told Allison about the rape "[b]ecause – it kept on irritating me. And it was hurting me, so I just went on and told it." In our view, A.L.R.'s testimony indicates that she reflected upon the statement prior to telling Allison. The theory underlying the excited utterance exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." State v. Land, 34 S.W.3d 516, 528 (Tenn. Crim. App. 2000). In other words, the heart of the excited utterance exception is spontaneity. Smith, 857 S.W.2d at 9. In the instant case, A.L.R.'s testimony reflects that she had ample time and opportunity to reflect upon her statement to Allison. Her statement was not made spontaneously but after thought and consideration. We are mindful that A.L.R. suffered a traumatic event earlier that week. However, we are constrained to conclude that the statement to Allison did not meet the excited utterance exception. Regardless, given the remaining proof at trial in combination with the jury's acquittal of the appellant on the rape charges, we conclude that this error was harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

D. "Lost Confession Letter"

The appellant's final complaint is that the State "should not have been allowed to present testimony regarding the contents of a lost confession letter, when this evidence was not revealed in discovery, and when the testifying witness did not remember significant portions of the letter." Specifically, the appellant complains that "[t]estimony regarding this letter was improper for three reasons: (1) it was not revealed in discovery, despite being 'documentary proof,' (2) as the rule of completeness could not be complied with, as the witness didn't remember the complete contents of the letter, and (3) as it was utterly unreliable evidence which risked gross prejudice against the [appellant]." The appellant contends that a mistrial should have been granted once the testimony was erroneously admitted.

The record reflects that on the second day of trial, French testified that she had received a letter from the appellant. The appellant objected, arguing that "[t]he letters are the best evidence of whatever their contents may be, one. Two, failure to disclose the letters in discovery."[4] The State responded that it could not give the appellant a copy of the letter because the letter was not in the State's possession. During a jury out hearing, French testified that the appellant "told me in the letter

[4] During a jury out hearing, French testified that she had received two letters from the appellant, "the first one like after a couple of months after he had been incarcerated. And then the second one like a month ago." However, at trial, testimony regarding limited portions of only the first letter were introduced at trial.

it stated that he did it but he didn't know her age." French said that she stopped reading the letter at that point and gave it to Ward. After French's jury out testimony, the appellant reiterated his earlier objections, adding that the rule of completeness required that the "statement should be introduced in its complete form." The trial court asked the State the location of the letter. The State responded that Ward thought she had kept the letter but had been unable to find it. The State informed the court that Ward had told them about the letter the previous afternoon.

During the jury out hearing, Ward testified that she revealed the existence of the letter to the State for the first time following the first day of trial. The State asked Ward to locate the letter. She said that she "put the letter up but I went to look for the letter yesterday and I can't find it." Ward asserted that she did not know the whereabouts of the letter and did not know any where else to look. Ward testified that she did not provide the letter to the State. She explained, "I put it in my drawer waiting like for a day or whatever it came up for this trial. Then I knew I would have that letter to present."

The trial court stated, "I do believe that the letter has been lost. I also believe that it is an admission by a party opponent." The trial court ruled that French could "authenticate" the letter because she recognized the appellant's handwriting and that Ward could testify regarding the contents of the letter. The jury returned to the courtroom, and French testified that in late 2003, the appellant sent her a letter bearing his return address and his handwriting. French gave the letter to Ward who read it. French testified at trial that in the letter the appellant wrote that he "f[*]cked" A.L.R. because she wanted him to, but he denied knowing her age. French stated that the appellant did not express any remorse for the act.

Later on the second day of trial, the appellant said, "I really should have done this earlier. But I would request a mistrial and a continuance based on the introduction of the letter so that there would be time to actually find the letter." At the close of the second day of trial, the trial court told the State to contact Ward and instruct her to make another attempt to find the letter. The next morning, defense counsel advised the court that both the State and the appellant's investigator had spoken with Ward and that she was unable to find the letter. The appellant again moved for a mistrial, and the trial court denied the motion.

The appellant's first complaint concerns the State's alleged failure to comply with discovery. Tennessee Rule of Criminal Procedure 16 governs the rights of parties in a criminal proceedings regarding discovery and inspection. In pertinent part, Rule 16(a)(1)(F) provides that

> [u]pon a defendant's request, the state shall permit the defendant to inspect and copy or photograph . . . documents . . . or copies thereof, *if the item is within the state's possession or control* and:
>
> (i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(emphasis added).

The proof at trial revealed that the State did not know about the letter. Moreover, in his brief, the appellant acknowledges that "the prosecution was also surprised by the revelation of the 'admission letter.'" Therefore, because the letter was not within the State's possession or control, the State did not violate the rules of discovery by failing to give the appellant a copy of the letter. See State v. Fox, 733 S.W.2d 116, 118 (Tenn. Crim. App. 1987); State v. Carter, 682 S.W.2d 224, 226 (Tenn. Crim. App. 1984).

Next, the appellant argues that "the rule of completeness could not be complied with, as the witness didn't remember the complete contents of the letter." Tennessee Rule of Evidence 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." In the instant case, no writing itself was introduced by the State. Instead, Ward testified about a written admission made by the appellant. Given the circumstances of this case, we conclude that the rule of completeness does not apply. See Clariday v. State, 552 S.W.2d 759, 766-67 (Tenn. Crim. App. 1976).

Finally, the appellant complains that testimony regarding the "lost letter" should have not been admitted because the danger of unfair prejudice outweighed the probative value. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401; see also State v. Kennedy, 7 S.W.3d 58, 68 (Tenn. Crim. App. 1999). Tennessee Rule of Evidence 402 provides that "[a]ll relevant evidence is admissible except as [otherwise] provided . . . . Evidence which is not relevant is not admissible." However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. It is within the trial court's discretion to determine whether the proffered evidence is relevant; thus, we will not overturn the trial court's decision absent an abuse of discretion. State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995).

In the instant case, the issues at trial concerned whether the appellant raped or inappropriately touched A.L.R. As such, the appellant's own admission in the letter that he had sexual intercourse with the victim was relevant. Of course, this evidence was prejudicial to the appellant but not unfairly so. Thus, the danger of unfair prejudice did not substantially outweigh the probative value

of the evidence. Moreover, we note that the appellant was acquitted of rape of a child, the very act to which he confessed in the letter.

Because we conclude that the trial court did not err in admitting testimony regarding the letter, we likewise conclude that the trial court did not err in failing to grant a mistrial upon admission of the evidence. See State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991).

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE